# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

BUTLER MEDICAL TRANSPORT, LLC

and

MICHAEL RICE, AN INDIVIDUAL

Case 5-CA-97810

WILLIAM LEWIS NORVELL, AN INDIVIDUAL

Cases 5–CA–94981 5–CA–97854

Matthew J. Turner and Andrew Andela, Esqs.
for the General Counsel.
Gil Abramson and Louis J. Cannon, Esqs., (Jackson Lewis, LLP)
Baltimore, Maryland, for the Respondent.

#### **DECISION**

### STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Baltimore, Maryland on July 2, 2013. William Norvell filed charges on December 14, 2012 and February 6, 2013. Michael Rice filed a charge on February 6, 2013. The General Counsel issued a consolidated complaint on March 20, 2013. The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act in discharging Norvell on about October 22, 2012 and in discharging Rice on about January 14, 2013. He also alleges that Respondent has violated Section 8(a)(1) in maintaining rules requiring employees to refrain from discrediting it on social networking sites and prohibiting the unauthorized posting or distribution of papers.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

#### FINDINGS OF FACT

#### I. JURISDICTION

Respondent, a corporation, provides ambulance transport to patients at hospitals, nursing homes, etc. It has an office in Owings Mills, Maryland and other locations in Maryland, the District of Columbia and York, Pennsylvania. It derives gross revenues in excess of \$500,000 from its operations and receives materials valued in excess of \$5,000 from points outside of

Maryland. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

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# Discharge of William Norvell

William Norvell worked as an emergency medical technician for Respondent starting in 2005. He last worked on July 21, 2012 and has been on workers compensation since that date.

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On October 10, 2012, Norvell accessed the Facebook page of Chelsea Zalewski on his personal computer at his home. Zalewski, who had been Norvell's partner at work, posted a note on this page indicating that Respondent had terminated her employment. Zalewski's post was as follows:

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Well no longer a butler employee...Gotta love the fact a "professional" company is going to go off what a dementia pt says and hangs up on you when you are in the middle of asking a question.

20 G. C. Exh. 13.

Several people, including another employee, Jake Hiepler, posted comments in response to Zalewski's post.

Zalewski responded to inquiries about what the patient reported to Respondent in the following post:

Yeah ur telling me! The pt said I told her that they never fix anything on the units...Yeah i no that pt I'm not dumb enough to tell her let alone any pt how shitty those units are they see it all on their own

Then Norvell posted the following comment:

Sorry to hear that but if you want you may think about getting a lawyer and taking them to court.

Another person posted a suggestion that Zalewski seek employment with Procare, another ambulance company.

Zalewski asked where Procare was located. Norvell responded that Procare was in Towson, Maryland. Then he added, "You could contact the labor board too."

G.C. Exh. 13.

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A printed version of these Facebook posts was delivered to Ellen Smith, Respondent's Human Resource Director. Smith consulted with Respondent's Chief Operating Officer, William Rosenberg. They decided to terminate Norvell's employment.

On October 22, 2012, Smith, with Rosenberg on a speaker phone, called Norvell. Smith asked Norvell whether he made the October 10 posts on Zalewski's Facebook page. Norvell responded that he had made those posts. Smith told Norvell that he violated the prohibition in G.C. Exh. 4, a bullet point list of Respondent's rules, which includes a promise to refrain from using social networking sights which could discredit Butler Medical Transport or damages it image, Tr. 82-83. Smith then informed Norvell that Respondent was terminating his employment. Neither Smith nor Rosenberg gave Norvell any reason for his termination other than his October 10 Facebook posts.

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I discredit the testimony of Rosenberg and Smith that Respondent had not decided to terminate Norvell when they called him on October 22. One of my reasons for this finding is that on January 10, 2013, Smith gave an affidavit to the Board stating that she and Rosenberg decided to terminate Norvell and then called him. I also discredit Rosenberg's testimony that Respondent terminated Norvell for spewing profanity during his conversation with Rosenberg and Smith. I also discredit his testimony that Norvell spewed profanity after he was told that he was being terminated. Norvell concedes that he was very upset and that his conversation with Rosenberg and Smith continued after he was informed of his termination. However, this record in no way supports a finding that Norvell's termination was justified by anything he said after Respondent told him he was fired.<sup>1</sup>

One reason I discredit this testimony is that there is no mention of Norvell's profanity in either of the affidavits Smith gave to the Board, G.C. Exhs. 12 and 13. In an affidavit given to the Board on March 4, 2013, Smith discussed Michael Rice's use of profanity at length, but did not raise this issue with regard to Norvell, although she discussed the reasons for his termination in that second affidavit.

## Analysis with regard to William Norvell's termination

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The only issue with regard to William Norvell's termination is whether or not his Facebook posts of October 10 constitute protected concerted activity within the meaning of the Act. There is no question that he would not have been terminated but for these Facebook posts. If these posts were protected, his discharge violates Section 8(a)(1), *Phoenix Transit System*, 337 NLRB 510 (2002).<sup>2</sup>

<sup>&</sup>lt;sup>1</sup> Since I conclude that Norvell's Facebook posts constituted protected concerted activity, as discussed below, I further conclude that Respondent's termination of Norvell cannot be justified under the test enunciated in *Atlantic Steel Co.*, 245 NLRB 814 (1979). First of all, the record does not adequately describe the nature of Norvell's outburst; secondly, the place, time and nature of the discussion, plus the provocation for any outburst leads me to conclude that Respondent had not established that Norvell lost the protections of the Act.

I note further that an employer seeking to be excused from its obligation to reinstate or pay backpay to a discriminatee for misconduct which was not a factor in the discriminatory action, has a heavier burden than when it is merely seeking to justify the original determination. Such an employer must prove the misconduct was "so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant," *Hawaii Tribune –Herald*, 356 NLRB No. 63 (2011) [sometimes cited as *Stephens Media*, *LLC*].

<sup>&</sup>lt;sup>2</sup> An analysis under the *Wright Line* (251 NLRB 1083 (1980)) doctrine is inappropriate in this case.

Norvell's Facebook posts must be considered in the context in which they were made. He was advising Zalewski, a fellow employee, to obtain an attorney/and or contact the Labor Board.<sup>3</sup> What I find particularly important is that Norvell was responding to a post in which Zalewski stated she had been terminated for commenting to a patient about the condition of Respondent's vehicles.<sup>4</sup> The condition of Respondent's vehicles was a matter of mutual concern to Respondent's employees. Indeed, Zalewski had been disciplined previously for commenting on the Facebook page of Leah Fornier, another employee, about the condition of Butler ambulances, G.C. Exhs 6 and. 12, page 3.<sup>5</sup>

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By advising Zalewski to obtain legal counsel or contact the Labor Board, I find that Norvell was making common cause with Zalewski regarding a matter of concern to more than one employee. Thus, I find his post to be protected.<sup>6</sup>

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It is not a defense to the unfair labor practice allegation that Norvell's posts were accessible to customers or others outside of Butler Medical Transport. In this regard, The relevant legal framework for analyzing this case was set forth in great detail in *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007):

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Section 7 of the Act provides, in pertinent part, that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." The protection afforded by Section 7 extends to employee efforts to improve terms and conditions

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If the Facebook posts were protected there is no issue as to whether Respondent had a non-discriminatory reason for discharging Norvell which must be analyzed under *Wright Line*.

<sup>3</sup> I do not credit Rosenberg and Smith that they had no idea that Norvell was referring to the NLRB. I also conclude it does not matter whether they thought he was talking about another state or federal agency. As discussed herein, I find Norvell was making common cause with Zalewski, who was fired because Respondent believed she had made comments about a matter of mutual concern to employees, i.e., the condition of Respondent's vehicles.

<sup>4</sup> Respondent argues that Norvell's post was not protected in part because he did not know why Zalewski had been terminated, Respondent's brief at page 10. However, Zalewski's posts, made prior to Norvell's posts, make clear what Zalewski was told was the reason for her discharge, i.e., Respondent's belief that Zalewski had complained to a patient about the condition of her ambulance.

<sup>5</sup> The fact the Zalewski had already been terminated when Norvell made his posts is irrelevant. She was still an employee entitled to the protection of the Act, *Little Rock Crate and Basket Co.*, 227 NLRB 1406 (1977). Thus, Norvell was making common cause with Zalewski by encouraging her to seek vindication of what he thought might be her Section 7 rights.

<sup>6</sup> Zalewski denied making the comment which led to her termination. However, I conclude this is irrelevant since Respondent believed she had commented to a patient about the condition of its vehicles, a matter about which at least she and Fournier were concerned. An employer violates the Act when retaliating against an employee for protected activity in which it mistakenly believed the employee was engaged, *NLRB v. Link-Belt Co.*, 311 U.S. 584, 589-90 (1941); *San Juan Lumber*, 144 NLRB 108 (1963); *JCR Hotel, Inc. v. NLRB*, 342 F. 3d 837 (8<sup>th</sup> Cir. 2003).

of employment or otherwise improve their lot as employees through channels outside the immediate employeeemployer relationship. See Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978). Thus, Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute. See, e.g., Allied Aviation Service Co. of New Jersey, Inc., 248 NLRB 229, 231 (1980), enfd. mem. 636 F.2d 1210 (3d Cir. 1980).

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But finding that employees' communications are related to a labor dispute or terms and conditions of employment does not end the inquiry. Otherwise protected communications with third parties may be "so disloyal, reckless, or maliciously untrue [as] to lose the Act's protection." Emarco, Inc., 284 NLRB 832, 833 (1987); accord Mountain Shadows Golf Resort, 330 NLRB 1238, 1240 (2000).

Statements have been found to be unprotected as disloyal 20 where they are made "at a critical time in the initiation of the company's" business and where they constitute "a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a

manner reasonably calculated to harm the company's reputation and reduce its income." NLRB v. Electrical Workers Local 1229 (Jefferson Standard), 346 U.S. 464, 472 (1953); accord: Endicott Interconnect Technologies,

Inc. v. NLRB, 453 F.3d 532, 537 (D.C. Cir. 2006), denying enforcement of 345 NLRB 448 (2005). The Board is careful, however, "to distinguish between disparagement of an employer's product and the airing of what

may be highly sensitive issues." Professional Porter & Window Cleaning Co., supra at 139. To lose the Act's protection as an act of disloyalty, an employee's public criticism of an employer must evidence "a malicious motive." Richboro Community Mental Health Council,

242 NLRB 1267, 1268 (1979).

Statements are also unprotected if they are maliciously untrue, i.e., if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity. See, e.g., TNT Logistics North America, Inc., 347 NLRB 568, 569 (2006). The mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate

that they are maliciously untrue. 45

The Board most recently addressed this issue in *Mastec Advanced Technologies*, 357 NLRB No. 17 (2011). Numerous Board cases establish that virtually any form of protected activity can be subjectively considered disloyal, including forming, joining or assisting a labor organization, e.g., *RTP Co.*, 334 NLRB 466, 467, 476 (2001), enfd. 315 F. 3d 951 (8<sup>th</sup> Cir. 2003). Moreover, protected activity will often adversely impact an employer's reputation and revenue. Indeed, Justice Frankfurter in his *Jefferson Standard* dissent observed that, "Many of the legally recognized tactics and weapons of labor would readily be condemned for "disloyalty" were they employed between man and man in friendly personal relations," 346 U.S 464 at 479-80.

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There is no question that if employees posted or handed out flyers asking the public not to patronize their employer because their equipment was substandard such conduct would be protected, *Kitty Clover, Inc.*, 103 NLRB 1665, 1687-88 (1953); *Arlington Electric*, 332 NLRB 845, 846 (2000). Appeals to customers that may adversely affect the employer's revenue have been found to be protected by Section 7 in many cases. For example, in *Allied Aviation Service of New Jersey, Inc.*, 248 NLRB 229 (1980), enfd. 636 F.2d 1210 (3<sup>rd</sup> Cir. 1980) the Board found that the letters of a union steward to his employer's customers were protected. The steward in that case claimed that his employer's practices relating to the servicing and maintenance of ground vehicles created a safety hazard to customers and resulted in inferior service.

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Pursuant to long-standing Board precedent, I conclude that the fact that Norvell's Facebook posts may have adversely affected Respondent's business is not a valid defense to the complaint allegations. I thus conclude that his conduct in making these posts was protected and that Respondent violated the Act in terminating him for making these posts.

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# Allegations with regard to the termination of Michael Rice

Respondent terminated Michael Rice on January 14, 2013 for making the following Facebook posting: "Hey everybody!!!!! Im fuckin broke down in the same shit I was broke in last week because they don't wantna buy new shit!!!! Cha-Chinnngggggg chinnng-at Sheetz Convenience Store," G.C. Exh. 10.

Respondent's Chief Operating Officer, William Rosenberg, testified without contradiction that he reviewed Respondent's maintenance records and determined that Rice's vehicle had not broken down when he made this post, Tr. 46. He further testified that the assertion made in Rice's post was false.

At an unemployment insurance hearing, Rice contended that his post referred to a private vehicle, not one of Respondent's ambulances. At the instant hearing, Rice was not called as a witness by the General Counsel. He was subpoenaed by Respondent and then refused to testify citing his rights under the Fifth Amendment of the United States Constitution. As a result I conclude on the basis of Respondent's uncontradicted testimony that the allegations made in his Facebook post were maliciously untrue and made with the knowledge that they were false. Thus I dismiss the complaint allegation regarding Rice's termination, *TNT Logistics North America*, *Inc.*, 347 NLRB 568, 569 (2006).

## Complaint paragraphs 4 and 5; illegal rules

Since at least October 1, 2010, Respondent's employee handbook has prohibited "unauthorized posting or distribution of papers," G.C. Exh. 3. Since at least November 17, 2011 Respondent has also distributed to all newly hired employees and discussed with them, a sheet of bullet points. Among the bullet points is the following promise by the employee, "I will refrain from using social networking sights which could discredit Butler Medical Transport or damages its image," G.C. Exhs. 4 and 5. The General Counsel alleges that these rules violate Section 8(a)((1) of the Act.

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Respondent argues at pages 34 and 35 of its brief that the list of a bullet points is not a "policy." This is a distinction without a difference. The bullet point regarding social networking sites was relied upon by Ellen Smith in terminating William Norvell. New employees were required to acknowledge receipt of these bullet points, see e.g. G.C. 5, and would reasonably understand they were subject to discipline up to and including termination if their conduct did not conform to the bullet points.

Both the handbook provision and bullet point policies cited above violate Section 8(a)(1). They are unlawful because employees would reasonably construe their language to prohibit Section 7 activity. The rule on its face is broad enough to prohibit posting and distribution of papers regarding wages, hours and other working conditions. It can reasonably be read to apply to non-work time and non-work areas. There is no evidence that Respondent effectively communicated a narrowed interpretation of its rules that would have clarified its scope and limited its application to non-protected distribution or posting of literature. Moreover, any rule that requires employees to secure permission from their employer before engaging in protected concerted or union activity at an appropriate time and place is unlawful, *Tele Tech Holdings*, *Inc.*, 333 NLRB 402, 403 (2001).

The bullet point regarding social networking sights is also illegal because it has been applied to restrict the Section 7 rights of Norvell and Zalewski, *Lutheran Heritage Village-Livonia*, 343 NLRB 646,647 (2004); *Mastec Advanced Technologies*, 357 NLRB No. 17 (2011), slip opinion at pp. 1n. 1, 13-14.

# Summary of Conclusions of Law

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- 1. Respondent violated Section 8(a)(1) of the Act in discharging William Norvell.
- 2. Respondent did not violate the Act in discharging Michael Rice.
- 3. Respondent is violating Section 8(a)(1) in maintaining a provision in its employee handbook that prohibits "unauthorized posting or distribution of papers."
  - 4. Respondent is violating Section 8(a)(1) in maintaining a policy that prohibits use of social networking sites which could discredit Butler Medical Transport or damages its image.

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#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged William Norvell, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>7</sup>

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## Order

The Respondent, Butler Medical Transport, LLC, its officers, agents, successors, and assigns, shall

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## 1. Cease and desist from

- (a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activity, including the posting or distribution of papers and the use of social networking sites.
- (b) Maintaining rules, policies, and/or provisions that prohibit the "unauthorized posting or distribution of papers" and/or which require employees to promise to refrain from using social networking sites which could discredit Butler Medical Transport or damages its image.

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- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
  - 2. Take the following affirmative action necessary to effectuate the policies of the Act.

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(a) Within 14 days from the date of the Board's Order, offer William Norvell full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

<sup>&</sup>lt;sup>7</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Make William Norvell whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.
(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify William Norvell in writing that this has been done and that the discharge will not be used against him any way.
(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
(e) Within 14 days after service by the Region, post at all its facilities copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2012.
(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.
Dated, Washington, D.C. September 4, 2013.

Arthur J. Amchan

Administrative Law Judge

<sup>8</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### **APPENDIX**

#### NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any employee for engaging in protected concerted activity, including the posting or distribution of papers and the use of social networking cites which pertain to wages, hours or other terms or conditions of employment.

WE WILL NOT maintain rules, policies and/or provisions that prohibit "the "unauthorized posting or distribution of papers" and/or which require employees to promise to refrain from using social networking sites which could discredit Butler Medical Transport or damages its image.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer William Norvell full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make William Norvell whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of William Norvell, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate William Norvell for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

	BUTLER MEDICAL TRANSPORT, LLC		
		er)	
Dated	By		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: <a href="https://www.nlrb.gov.Bank">www.nlrb.gov.Bank</a> of America Center, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-4061

nter, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-406 (410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

## THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2864.